UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JANE DOE,

Plaintiff,

v. 15 CV 7726 (JMF)

STEVEN KOGUT,

Conference

Defendant.

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New York, N.Y.
July 27, 2016
2:05 p.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

DEREK T. SMITH LAW GROUP, PLLC
Attorneys for Plaintiff
BY: ZACHARY HOLZBERG

NESENOFF & MILTENBERG
Attorneys for Defendant
BY: PHILIP A. BYLER

(Case called)

MR. HOLZBERG: Good afternoon, Your Honor. Zach Holzberg of the Derek Smith Law Group for plaintiff, Jane Doe.

THE COURT: Good afternoon.

MR. BYLER: Good afternoon, Your Honor. Philip A. Byler from Nesenoff & Miltenberg, representing the defendant, Steven Kogut.

THE COURT: Good afternoon. So I'm told by Judge Netburn and infer from your presence here that the case did not settle; correct?

MR. HOLZBERG: Correct.

THE COURT: All right. So we have until August 2 to complete discovery. Talk to me. Have you settled on a deposition schedule?

MR. BYLER: Your Honor, I did propose dates for the party depositions. We don't have control over the nonparty witnesses, and there's a lot of them. And those dates didn't work with Mr. Holzberg. I quite frankly have to ask, and I think my adversary will agree with this, that we get more time for discovery to do the proper depositions in this case. There's no way practically that nonparty depositions can take place before August 2, and we've got to figure out dates for the party depositions.

I also have to raise the fact that probably there's going to have to be some supplemental document production. I

just got their documents two weeks ago, and I got 36 pages with a lot of objections. I want to try to work that out with counsel. I think there are other documents coming my way, and I want to make sure our document production is complete.

I realize that I'm basically requesting the Court to exercise discretion, but given the fact that we did not have a settlement today, it appears that we have a litigation that's going to be a serious one over some relatively new New York State and New York City provisions.

One other request I was going to make is permission to move to amend my answer to add an affirmative defense to make clear that if you try to apply these statutes with just a preponderance of the proof standard, that you have a constitutional issue. The first claim that plaintiff asserts is under New York CPLR 213-c which gives a private right of action for what are criminal offenses, rape in the first degree, sexual assault in the first degree. And in the normal course, if you're going to pursue a criminal case against someone, you'd be dealing with a proof beyond a reasonable doubt.

THE COURT: But it's not a criminal case. It's a civil case.

MR. BYLER: I know it's a civil case, but you have in question serious questions, as far as I'm concerned, that if you're going to take this over into the civil context with the

law providing that you don't need a criminal proceeding in order to bring the cause of action. And if you're going to bring it over saying you don't even have to, I guess, make a criminal complaint, which is true here, there never was a criminal case pursued, that you're going to say that by a preponderance we're going to hold you liable for money damages for what is, in the penal code, a crime. I think there's constitutional issues there. I want to preserve it. I want to preserve it just by amending my answer to add an affirmative defense, and it's not in terms of a facial attack, but an as-applied attack.

THE COURT: I don't think that this is an affirmative defense. I think it's an argument with respect to the jury instructions, which you're welcome to make to preserve. I think it's frivolous. I would be shocked if you could cite a single authority in support of the argument. I think, as far as I'm aware and anyone familiar with the OJ Simpson proceedings knows, you can be acquitted of criminal conduct and then sued civilly, and it's a preponderance standard. I don't know what you're talking about. Maybe there's authority to support the argument you're making, but I am highly, highly skeptical, and I would beware of making an argument that is frivolous.

MR. BYLER: I understand. There's not much law under these statutes.

THE COURT: Okay. Well, it's not a question of these statutes, but there is a pretty long history of people being sued civilly for things that constitute criminal conduct. And if you can't cite a single authority for the proposition that when plaintiff does that it requires a higher burden of proof than the standard preponderance, then I would recommend not making the argument.

MR. BYLER: I understand.

THE COURT: Don't interrupt me. I would recommend not making the argument and I would recommend not even bothering to preserve the issue. But if you feel the need to preserve the issue, you may. Again, I don't think that involves amending your answer so much as submitting your proposed jury instructions and proposing that the jury should be instructed that it needs to find by clear and convincing evidence or beyond a reasonable doubt and my rejecting that argument, but I'll leave that to you.

MR. BYLER: Look, I didn't want any question of fair notice if I raise an issue at that point. That's what I'm doing. I'm trying to preserve because, as I said, it's a statute -- these are new statutes, and how they get applied, you know, it's going to be interesting.

The other request I make is if I have permission to move to amend the answer to add a counterclaim. And the counterclaim would be the New York Administrative Code, same

statute that plaintiff has invoked only, obviously, Steven Kogut claiming a crime of violence on the part of the plaintiff. And I would request that I be given leave to make that motion and, you know, obviously, they would oppose it, and we have that motion before your Honor at some point in the near future.

THE COURT: What would the good cause be for why you didn't make that --

MR. BYLER: I'm sorry?

THE COURT: What would the good cause be for why you didn't make that motion by the deadline for filing amended pleadings?

MR. BYLER: We have just had document production. We're in the middle of discovery. I think the standard is leave is freely granted --

THE COURT: No.

MR. BYLER: -- if there's no bad faith here.

THE COURT: No, that's not the standard. The standard is under Rule 16 it requires a showing of good cause, which requires you to demonstrate due diligence. My question to you is what is the good cause here? This is a he said-she said case. This is not a document case where you needed discovery to understand what your client's view and understanding and experience and story is. You should have and could have known what his claim was at the time that you filed the answer, and I

find it very hard to understand what your possible showing of good cause could be to add a counterclaim at this point in the litigation.

MR. BYLER: If you're not going to allow me to make the motion --

THE COURT: I'm allowing you to tell me what you think the good cause is.

MR. BYLER: I think the good cause is that in discussing with the client what the documents show and having the mediation this morning, quite frankly, hearing out the story, that I have a basis for making that counterclaim where it was not, perhaps to my failing, apparent to us, defense counsel, when the answer was filed much earlier in the case.

THE COURT: All right. I'll deem that motion made, and it is denied.

Now let's talk about discovery because I don't see why I should give you guys any more time. You have had this schedule -- sorry, you were given four months back in February, and I grudgingly gave you an extension to August 2 and was very clear in the order in which I granted that extension that you would not get any further extensions, which is to say you were on notice. To the extent you needed to schedule depositions, party or nonparty, you were on notice that you needed to do it.

So now I am troubled by the back and forth in your letters. I am troubled by some of the representations made in

those letters. Quite frankly, Mr. Byler, I am troubled by some of your representations, in particular the claim that you did not know about the scheduled deposition for Mr. Kogut when, by all indications and from the e-mail that you sent, it seems very clear that you did know; and I am not quite sure what to do about that.

But the bottom line is I don't know why you guys deserve any more time than you have already been given in this case. You have had close to six months to complete discovery in a case that is basically a he said-she said kind of case. So as far as I'm concerned, you're going to -- you have a pretty tough road to persuade me you should have any more time than next Tuesday.

MR. BYLER: Remember what you call the scheduled discovery, you were just talking about a wish list mostly of nonparty witnesses for which there would have to be subpoenas served on them. We're only talking, really, about the deposition of defendant, and we've offered it, you know, a date for that. And I'd be very glad to work out with Mr. Holzberg mutual dates that are acceptable to us both with respect to the depositions. I understand that apparently the day I offered wasn't good enough in terms of his own schedule, which I respect.

But, you know, I don't know what to tell you other than we are where we are, and I'm basically asking the Court to

give counsel, both sides, the opportunity to do depositions properly in this case. What is done is done. I hear you, but what is done is done. And given the issues and the interest in this case in terms of the application of these statutes, I would request that you do give us more time because, as I said, I think there's more document production that both sides may end up giving each other, and there's the deposition of the parties. And he said-she said, yeah, you look at what other evidence is out there; we have no way of getting nonparty depositions done before August 2. That's where we are right now.

THE COURT: And the fault for that lies squarely with the two of you, not with me.

Let me hear from Mr. Holzberg.

MR. HOLZBERG: Thank you, your Honor.

THE COURT: Into the microphone, please.

MR. HOLZBERG: You got it. Respectfully, your Honor, we noticed depositions for defendant back in May along with several subpoenas for nonparty witnesses. Mr. Byler indicated that he was not accepting, just a few days ago, on behalf of the nonparty witnesses. However, in his 26(a) disclosure statement he listed those witnesses as in care of his firm. To me, that -- I interpreted that to mean that "in care of" means that he would accept on their behalf.

Regardless, we made an attempt, several attempts, in

this case to actually comply with your Honor's orders. In May, as I mentioned, we sent deposition notices, and Mr. Byler had asked me at that time for an extension. And in good faith I said, sure, and a joint letter was filed, and your Honor granted it. And knowing full well of your Honor's order indicating that it was a one-time extension, again, I rather than talking about doing something, I did something, and I noticed the depositions for a second time. And, obviously, as you read in our letters, they failed to appear.

THE COURT: Did you incur any expenses in connection with that?

MR. HOLZBERG: I did not end up having a court reporter that day, so there were no real expenses.

THE COURT: Okay. Go on.

MR. HOLZBERG: I feel as though I've made every reasonable attempt to comply with your Honor's order, and while Mr. Byler now thinks that -- you know, excluding today, until August 2 we have four days, four business days, to complete these depositions. I already have depositions scheduled on two other days for other cases. So to me it's as though I was hoping that your Honor would extend beyond your Honor's word that it was a one-time extension. I was not willing to take that risk, and I treated it as such.

I mean, if it's in your Honor's judgment that we would get an extension, then that's -- I see that being the only way

possible to complete discovery. I don't believe that Mr. Byler should have an extension granted based on his previous conduct; but, in all reality, I don't believe that it's possible to complete discovery based on the failure of Mr. Byler to comply with most of the scheduled discovery in this case.

THE COURT: Now, on June 9 of this year, which was 15 days before the original deadline for discovery, Mr. Byler submitted a letter in which he stated that there were -- had been and were no discovery disputes that required intervention. You didn't tell me otherwise, and which is to say that with two weeks remaining in discovery at that point and, frankly, no reasonable expectation on your part that you would get any additional time at that point, no one told me that there were any discovery issues. So this, again, is on the two of you.

Now, going back to the subpoenas issue, other than the representations made in the initial disclosures, which I'll ask Mr. Byler about in a moment, what basis did you have to believe that they were authorized to receive subpoenas on the part of the nonparty witnesses?

MR. HOLZBERG: Like your Honor said, the "in care of." The main nonparty witnesses that we had initially sent to Mr. Byler were Mr. Kogut's children. We figured that that would not be an issue. It was only after later on did we send the additional subpoenas for the other nonparty witnesses just on the basis that they were listed as in care of his firm.

THE COURT: Did you ever ask if they were authorized to receive those subpoenas?

MR. HOLZBERG: No, your Honor.

THE COURT: In the discussions with either Mr. Byler or his paralegal that are referenced in the letters, were there discussions with respect to the scheduling of the depositions of the children, or was it limited to the scheduling of Mr. Kogut's deposition?

MR. HOLZBERG: Honestly, your Honor, I had no discussion with Mr. Byler as to any schedule. Mr. Byler's paralegal spoke to my paralegal, and to the best of my understanding, it was that we should schedule something. There were no proposed dates that I became aware of until just yesterday when I spoke to Mr. Byler's paralegal last night and she indicated two dates over the next four days. Other than that, I did not receive any proposed dates for any depositions.

THE COURT: What I'm asking, though, is did you receive proposed dates with respect to the depositions of Mr. Kogut's children? Putting aside the party depositions, what I'm trying to figure out is what representations, if any, were made or what omissions, if any, were made with respect to whether they were authorized to receive those is subpoenas.

You served those subpoenas on them by e-mail, as I understand it, on July 11. And my question is until Mr. Byler's letter to me of the other day, did you have any

reason to believe that they were not authorized to receive the subpoenas on behalf of the children?

MR. HOLZBERG: No, your Honor.

THE COURT: What reasons did you have to believe that they were authorized to receive those subpoenas?

MR. HOLZBERG: I had sent the subpoenas back in May, as I indicated, and they did not raise that issue at that time. And as I mentioned, also the "in care of" led me to believe that and their failure to bring it up in May.

MR. BYLER: Your Honor, just real quickly. Some of the witnesses he subpoenaed --

THE COURT: Mr. Byler. Mr. Byler, please don't interrupt. Have a seat, please.

MR. BYLER: Okay.

THE COURT: Thank you.

Anything else?

MR. HOLZBERG: No, your Honor.

THE COURT: Okay. I think part of the problem here is that you guys need to learn how to use a telephone and talk to each other, and it seems clear to me that part of the problem here -- I don't know if it's on the part of the communications within your offices or between your offices, but when you delegate these tasks to paralegals who are not the ones standing up in court, it becomes very difficult to say exactly what happened, and problems arise. And I would think, given

the problems that were very clear -- clearly did arise in connection with the first letter that Mr. Holzberg submitted to me, I am frankly stunned that in the last letter I received from Mr. Byler, you persist in saying our paralegal will talk to their paralegal, and we'll do it that way. Pick up the phone and talk to each other directly. It is a very simple way of communicating and avoids a lot of game of telephone and miscommunication.

Okay. Mr. Byler, back to you. Tell me why I shouldn't permit them to serve the subpoenas on the children and proceed with those depositions given the reasons they had to believe that you were authorized to receive the subpoenas.

MR. BYLER: Well, first of all --

MR. HOLZBERG: Your Honor, sorry. Excuse me. If I may, your Honor, explain why there's been no telephone communication, I would be happy to do so.

THE COURT: Fine. Mr. Byler, have a seat again.

Mr. Holzberg.

MR. HOLZBERG: Thank you, your Honor. Back several months ago, I'll say February/March, I had contacted Mr. Byler over the telephone. Up to that point, we had an amicable relationship in dealing with each other. And I tried to express a concern of mine, and Mr. Byler hung up on me. I didn't bring it to your Honor's attention at that time, but I called Mr. Byler back, and I don't -- I mean, I hate to bring

this up, but he was extremely rude, and because of that, I chose from that point forward to speak with his paralegal who has been more than accommodating. But as far as I'm concerned, the disrespect on behalf of Mr. Byler, I didn't -- I have not really communicated with him unless necessary.

THE COURT: All right. Well, you should communicate with him because he is your adversary, and if you need to do that in writing by e-mail, that's fine, but you should communicate with him.

Mr. Byler, I don't want to --

MR. BYLER: I was just going to say --

THE COURT: I don't want to get into that, but speak to me about the subpoenas.

MR. BYLER: Okay. The subpoenas were served on a number -- or sent to us identifying a number of witnesses. The only ones which you could even think about us accepting service, which we had never represented we would, would be the Kogut daughters who are --

THE COURT: That's what I want you to focus on.

MR. BYLER: Because the other individuals --

THE COURT: I want you to focus on the daughters.

MR. BYLER: Okay. The other individuals, we had no connection.

THE COURT: I want you to focus on the daughters.

MR. BYLER: Okay. They are of an age where we don't

represent them personally; okay? I always believe that if you were a lawyer and you take a subpoena on behalf of that person, you get authority to do so. The daughters of Kogut are of an age where they can say, No -- the oldest is 26 -- I'm going to go talk to my in-house lawyer, which is a major company here in New York City. I don't want you doing anything because talking in this case may affect my employment, wrongly or rightly.

Okay. So I didn't have that authority ever to say we accept. Now, I didn't, for whatever reason, know about -- I was truthful when I said I didn't know about it till I wrote my second letter, and so it didn't come up before then. Had it then, you know, it would have been a different way of handling it. But from the first time that I learned about the subpoena, I said we didn't have authority to accept service on behalf of anybody including, obviously, the Kogut daughters. And why they were -- we didn't make a fuss about it is I assumed we would work out amicably a deposition schedule, given the time involved in your Honor's current order. I wasn't going to make a fuss on a technical point, but we were in a situation in which, since the issue was pressed, no, we don't have authority. I've never spoken to the Kogut daughters to say: May I accept this subpoena? I would have gone to them and said: Would you please cooperate and do a deposition on such and such date? That was my intention. It was not an intention to frustrate any process.

THE COURT: Okay. Let me tell you what I'm going to do in stages. First, you are going to take the depositions of the plaintiff and the defendant in the next few days. My question is -- you're not leaving until we nail down what days that it's taking place. Now, as far as I'm concerned, can we do it Friday and Monday? Any problem with that? And then we can talk about which one is which.

MR. HOLZBERG: Your Honor, I have a deposition scheduled for Friday and Tuesday, the 4th. I would be available, I guess --

THE COURT: Tuesday is the 2nd.

MR. HOLZBERG: Sorry. I apologize. Yes. I don't know that I'm -- I'll try to prepare, I guess, for tomorrow. Monday is fine by me. I would prefer not to do tomorrow if we don't need to, but that pretty much -- I have a deposition on Friday and Tuesday.

THE COURT: Could you defend the deposition tomorrow?

MR. HOLZBERG: I could try, yeah.

THE COURT: All right. What about you, Mr. Byler, can you take the plaintiff's deposition tomorrow and defend the deposition of defendant on Monday?

MR. BYLER: I can defend Steven Kogut tomorrow.

THE COURT: I'm sorry?

MR. BYLER: I could defend Steven Kogut tomorrow. I'd like to take the deposition of plaintiff on Monday. I think

that was the proposal I made at some point in the last 24 hours that he could go first with the defendant Kogut, Thursday's fine, Friday's fine, and that I would do the plaintiff's deposition Monday or Tuesday.

THE COURT: Okay. And he's not free on Tuesday.

MR. BYLER: I understand that.

THE COURT: What about Wednesday? Are you both free on Wednesday?

MR. BYLER: I'm not good on Wednesday.

THE COURT: Why?

MR. BYLER: I've got another case commitment there. Monday would be fine.

THE COURT: Which is what?

MR. BYLER: In the morning.

THE COURT: Which is what? What is the commitment?

MR. BYLER: It is a commitment involving a litigation involving property out in Long Island.

THE COURT: What is the commitment?

MR. BYLER: The commitment is to attend part -- hopefully, the settlement conference pre-litigation between the parties to what we are litigating over property in Suffolk County Long Island.

THE COURT: Is there a judge involved in that?

MR. BYLER: No. It's pre-litigation.

THE COURT: So reschedule that. You're going to do

one deposition on Monday with Mr. Kogut and the plaintiff's deposition will take place next Wednesday. I'll give you a one-day extension of discovery for the purposes of completing the plaintiff's deposition. All other discovery remains to be done by Tuesday with the following exception: I personally think that plaintiff had absolutely good faith reason to believe that the defendant -- that counsel was authorized to accept subpoenas on behalf of the Kogut daughters. I will permit plaintiffs to serve those subpoenas directly on the Kogut daughters, unless counsel is will to accept service on their behalf and is authorized to do so, and to complete those depositions by September 2.

In the meantime, all other deadlines remain in place, which is to say that all discovery is to be done by Tuesday with the sole exception of the plaintiff's deposition, which will take place on Wednesday and the depositions of the daughters which can go forward at any point prior to September 2.

The next deadline is the filing of -- I assume no one's filing for summary judgment in this case. I can't imagine summary judgment being granted in this case. Good. So then the joint pretrial order is due on September 6, which is the day after Labor Day. I'm not planning to grant any extensions of that deadline, so plan accordingly. If you're away for the week before Labor Day, or what have you, you have

to plan with each other, communicate with each other, and make adequate plans to make sure that you file your joint pretrial order and all related things on September 6 or before September 6. All right. Look at my individual rules to see precisely what that joint pretrial order means and everything that you are to file by that deadline.

Any questions? Anything else to discuss?

MR. HOLZBERG: No, your Honor. Thank you.

MR. BYLER: May I get a copy of the transcript?

THE COURT: You're welcome to pay the court reporters and get a copy of the transcript. That's not my business.

Now, I should tell you I have a trial in the GM MDL beginning September 12, so trial will not take place two weeks after you file the joint pretrial order. But you should be prepared to go to trial as soon as the GM trial is over, and that will take place probably sometime in October, and I'll be in touch with you about that in due course.

Thank you very much. I'll stay on the bench, but the matter is adjourned.

MR. HOLZBERG: Thank you, your Honor.

(Adjourned)